77-1736

No.

Supreme Court, U. S.
FILED
JUN 5 1978
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1977

ALBERT SMITH, President of the Village of Skokie, Illinois; JOHN N. MATZER, JR., Village Manager of the Village of Skokie, Illinois; HARVEY SCHWARTZ, Corporation Counsel of the Village of Skokie, Illinois; and the VILLAGE OF SKOKIE, Illinois, a municipal corporation,

Petitioners,

vs.

FRANK COLLIN and the NATIONAL SOCIALIST PARTY OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Scheffer Press, Inc.—(312) 263-6850

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No.

ALBERT SMITH, President of the Village of Skokie, Illinois; JOHN N. MATZER, JR., Village Manager of the Village of Skokie, Illinois; HARVEY SCHWARTZ, Corporation Counsel of the Village of Skokie, Illinois; and the VILLAGE OF SKOKIE, Illinois, a municipal corporation,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Pursuant to Supreme Court Rule 19, Albert Smith, President of the Village of Skokie, Illinois; John N. Matzer, Jr., Village Manager, Harvey Schwartz, Corporation Counsel, and the Village of Skokie, Illinois, a municipal corporation, who are defendants in this case, file this petition for writ of certiorari to review the judgment of

the United States Court of Appeals for the Seventh Circuit, which affirmed the judgment of the United States District Court for the Northern District of Illinois.

OPINIONS BELOW

The opinions of the United States District Court and the United States Court of Appeals are not as yet reported. The opinion of the United States District Court is set forth in a separate appendix, as Appendix A. The opinion of the United States Court of Appeals is set forth as Appendix B in the separate appendix.

GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

The judgment sought to be reviewed herein was decided on May 22, 1978 and entered on the same date. No petition for rehearing has been filed.

The statutory provision which confers on this Court jurisdiction to review the judgment in question by writ of certiorari is Section 1254(1) of the United States Code.

REASONS FOR GRANTING CERTIORARI

This case is of sufficient importance to warrant final determination by the highest court of the United States of America.

The national and international attention which this case has attracted does not result from sensationalism or morbid curiosity, but rather from the issues involved which have engendered concerns shared by thoughtful men and women everywhere. The heightened consciousness and perception of American Jews as a result of the Nazi Holocaust and the juxtaposition of their 14th Amendment rights against the 1st Amendment rights of the American National Socialist (Nazi) Party presents a uniquely new circumstance for which existing precedent is insufficient.

The opinions of the lower courts have extrapolated from a wide variety of cases ranging from those involving the outlawing of criminal syndicalism laws, to the right of the New York Times to publish government information, to fighting words addressed to individuals, to individual libel suits, to obscene expressions of opposition to the Viet Nam war. The petitioners have asserted the validity of many decisions of this Court to justify their contention that the constitutional rights of citizens of the Village of Skokie would be infringed by Village action (e.g. granting a permit) which woule result in inflicting emotional suffering upon them.

Other reasons for granting certiorari are as follows:

1. The decision below is in conflict with this Court's ruling in *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952).
2. The opinion of the Court of Appeals contains conclusions which are at variance with principles of law enunciated by this Court in other cases.

3. The acts of the Village authorities in prohibiting the proposed demonstration were justified by the existence of a clear and present danger of a substantive evil.

4. The ordinances are not unconstitutionally overbroad or vague.

5. The concept of freedom of speech in the marketplace of ideas has no application to the conduct prohibited by the Skokie ordinances.

6. The proposed demonstration is an intentional incitement to riot and a deliberate provocation which does not warrant 1st Amendment protection.

All of these matters warrant comprehensive consideration and resolution by the United States Supreme Court.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

1. Can an Illinois municipality, possessing sovereign state powers, deny a permit for a public demonstration if it involves acts which portray criminality, depravity or lack of virtue in a person or group of persons by reference to racial, religious, or ethnic affiliation?

2. Can such a municipality prohibit the dissemination of materials which promote and incite hatred against persons by reason of their race, national origin or religion and is intended to do so?

3. Was the denial of permission to the plaintiffs to conduct a public demonstration a violation of their constitutional rights?

4. Given the ethnic and religious composition of the Village of Skokie, is a public demonstration by professed Nazis in storm trooper uniform with swastika a deliberate provocation and an intentional incitement to riot which does not merit 1st Amendment protection?

5. Was the ruling of the United States Court of Appeals contrary to the United States Supreme Court decision in *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952)?

6. Would the granting of a permit for the proposed demonstration by the Village of Skokie deprive those citizens of the Village who are Jewish and more particularly those naturalized Jewish citizens who are survivors of the Holocaust, of rights guaranteed to them under Section 1 of the 14th Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND VILLAGE ORDINANCES INVOLVED

These are:

(1) The 1st Amendment to the Constitution of the United States, as follows:

> Freedom of religion, speech and press; peaceful assemblage; petition of grievances
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(2) Section 1 of the 14th Amendment to the Constitution of the United States, as follows:

> §1. Citizenship rights not to be abridged by states
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(3) Skokie Village Ordinance No. 77-5-N-994 entitled "AN ORDINANCE RELATING TO PARADES AND PUBLIC ASSEMBLIES." The relevant portions of this ordinance are the following:

Section 27-51. Permit Required. No parade, public assembly or similar activity, where the number of participants expected may reasonably be assumed to exceed fifty (50) or more persons, and/or vehicles is permitted on any street or area of the Village unless a permit allowing such activity has been obtained from the Village Manager, or upon referral, to the President and Board of Trustees; provided, however, that this Ordinance shall not apply to students going to and from school classes, or participating in educational activities under the immediate direction and supervision of school authorities or a governmental agency acting within the scope of its functions, nor shall a permit be required for normal or scheduled activities of the Village.

Section 27-56. Standards for Issuance.

b) The activity will not create an imminent danger of a substantial breach of the peace, riot, or similar disorder.

c) The conduct of the parade, public assembly, or similar activity will not portray criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation.

This ordinance in its entirety is set forth in a separate appendix to this petition as Appendix C.

(4) Skokie Village Ordinance No. 77-5-N-995 entitled "AN ORDINANCE PROHIBITING THE DISSEMINATION OF MATERIALS WHICH PROMOTE AND INCITE GROUP HATRED."

The relevant portions of this ordinance are: Sections 28-43, 28-43.1 and 28-43.2.

Sec. 28-43 Prohibition of materials promoting or inciting group hatred.

Sec. 28-43.1 The dissemination of any materials within the Village of Skokie which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so, is hereby prohibited.

Sec. 28-43.2 The phrase "dissemination of materials" includes but is not limited to publication or display or distribution of posters, signs, handbills, or writings and public display of markings and clothing of symbolic significance.

This ordinance in its entirety is set forth in a separate appendix to this petition as Appendix D.

(5) Skokie Village Ordinance No. 77-5-N-996 entitled "AN ORDINANCE PROHIBITING DEMONSTRATIONS BY MEMBERS OF POLITICAL PARTIES WEARING MILITARY-STYLE UNIFORMS."

The relevant portions of this ordinance are: Sections 28-42.1 and 28-42.2.

Sec. 28-42.1 No person shall engage in any march, walk or public demonstration as a member or on behalf of any political party while wearing a military-style uniform.

Sec. 28-42.2 "Political party" is hereby defined as an organization existing primarily to influence and deal with the structure or affairs of government, politics or the state.

This ordinance in its entirety is set forth in a separate appendix to this petition as Appendix E.

STATEMENT OF THE CASE

A. JURISDICTIONAL SUMMARY

The trial court found that it had jurisdiction over this case under the provisions of Title 42, Section 1983 and Title 28, Section 1343(3) of the United States Code.

B. THE PARTIES

The plaintiffs are Frank Collin, leader of the National Socialist Party of America, and the National Socialist Party of America. The defendants are Albert J. Smith, Skokie Village President; John N. Matzer, Jr., Skokie Village Manager; Harvey Schwartz, Skokie Corporation Counsel; and the Village of Skokie.

C. THE PROCEEDINGS

The plaintiffs filed a complaint against the defendants asking that specified ordinances enacted by the defendant Village be declared void and that an injunction issue against their enforcement.

They alleged that they had been refused a permit to conduct a parade within the Village of Skokie based upon their inability to meet the conditions of these ordinances and that the ordinances imposed criminal sanctions upon them in the event of their conducting their demonstration.

The District Court, after hearing the evidence, held all three ordinances to be facially invalid. The Court re-

strained the enforcement of those portions of the "Permit" ordinance referred to above, and restrained the enforcement of the "Military Style Uniforms" ordinance.

The United States Court of Appeals for the Seventh Circuit affirmed the decision of the District Court.

D. STATEMENT OF THE FACTS

The defendant Village of Skokie generally adjoins the northwest portion of the City of Chicago. In 1974, its population was approximately 70,000 persons of whom 40,500 were Jewish. Other racial and ethnic groups within the Village include Blacks, Indians, Japanese, Chinese and Filipino. Some 1970 Census figures pertaining to Skokie are:

Persons who migrated to the U.S. between 1945 and 1970	3,340
Foreign born, who indicated Yiddish to be their mother tongue	1,758
Native born who indicated Yiddish to be their mother tongue	9,212
Number of persons whose country of origin is Poland	3,819
Number of persons whose country of origin is U.S.S.R.	8,075

The total number of Jewish survivors of World War II and their families is approximately 7,000 persons.

The Village has an established policy of integrated housing and fair employment and is committed to providing subsidized housing on a completely non-discriminatory basis. It has experienced some racial and religious disturbances in the past and has a Human Relations Commission to deal with these problems.

The northeastern quadrant of the Village adjoins a portion of Evanston which contains a large Black population. During recent years, Blacks and other minority persons have been peacefully integrated into the Village.

The National Socialist Party of America was described by its leader, plaintiff Frank Collin, as a "Nazi organization." (Tr.P. 4)

Mr. Collin described the uniform of the National Socialist Party of America, as follows:

> ". . . We wear brown shirts with a dark brown tie, a swastika pin on the tie, a leather shoulder strap, a black belt with buckle, dark brown trousers, black engineer boots, and either a steel helmet or a cloth cap, depending upon the situation, plus a swastika arm band on the left arm and an American flag patch on the right arm." (Tr.P. 27)

The policy of the National Socialist Party of America with regard to Jews is:

> ". . . Basically we believe that the Jews are in the forefront of the International Communist Revolution and that they have inordinate amounts of political and financial power in the United States and throughout the world.
>
> ". . .Jewish involvement in Communism and in the Federal Reserve conspiracy should be exposed and documented and presented to the American public for their own conclusions." (Tr.P. 28-29)

Mr. Collin gave the views of the National Socialist Party of America with respect to Black Americans, as follows:

> ". . . We believe, . . ., that the Negro race is biologically inferior to the white Aryan race." (Tr.P. 13)

The stated policy of the Party with respect to Black Americans, is as follows:

> ". . . We believe . . ., that the Negroes should be repatriated to their African homeland, as quickly as possible." (Tr.P. 15)

Defendants' Exhibit 9 is a publication by the National Socialist Party of America entitled "WE ARE COMING!", which contains the following statements: "Where one finds the most Jews, there also shall one find the most Jew-haters. With this basic truth in mind, we are now planning a number of street demonstrations and even speeches in Evanston, Skokie, Lincolnwood, North Shore, Morton Grove, etc. . . ." The back page of this exhibit contains a figure with a hand clutched at its throat and the words "SMASH THE JEW SYSTEM!"

Sol Goldstein, a Skokie resident and resident of Kovno, Lithuania on Sunday, June 22, 1941, gave the following testimony on the trial of the cause:

The 501 Program

> ". . . It was then the S.A. people came and asked for 501 college graduates, intellectuals, for special work for the German authorities, men only . . . They got the 501 and they took them away and the next day we got a report from one or two who had escaped that they were killed the same day that they took them away."

The Left and Right Pairing

> ". . . On October 28 on the square that was called the Democrat Square all of the Jewish people were ordered at 6:00 o'clock in the morning, to appear

and to be lined up by families. Anyone to be found in his home will be shot to death. . . .

". . . Then came the S.A. Their leader was Mr. Jodl, with a yellow uniform, with a swastika. He reviewed the whole thing and started to segregate, "You go to the left. You go to the right. You go to the left, you go to the right.'

". . . It took a whole day long like this. Some families were split, some families went together and some did not. Thirteen thousand went to the right and . . . fifteen thousand went to the left. I was between the 15,000, without knowing whether this was better or worse . . .

" . . In the morning, a few people who came back to the ghetto who escaped . . . informed us that . . . about six kilometers away from Kovno, all of these 13,000 were told to undress themselves, to give away all of their belongings and they were shot to death.
". . . After two or three days later the German Gestapo brought their clothing to the ghetto . . .
". . . So, in October 28th, 29, out of the 45,000 got left only 15,000 over."

The Children's Action

". . . The German authorities ordered that the Jewish people have to give away to them all of the children that cannot go to work according to their law. I believe it was up to the age of 11 or 12. . . . Mothers came whose infant they grabbed from her arms, the children, the infants, and threw them—threw them in the vans like packages and took them away, and this was the Children's Action, and they killed them, too . . ."

Q. "What does that uniform and swastika mean to you?"
A. "Death in a most terrible form; not only death to be shot in a moment to be killed but death after torture."

David Gutmann, Ph.D., Professor of Psychology in the Northwestern University Medical School and Chief of the Psychology Division in the University's Department of Psychiatry and Behavioral Science, gave the following testimony:

"When individuals and/or the group with which they are affiliated have been subjected to severe and repeated traumatic experiences, these individuals will be prone to respond to any reminders of their persecution in a total fashion, as if they were again subjected to the totality of noxious conditions under which their painful associations were originally formed."

"No matter what words their placards bear, when Nazis march in Skokie, their presence and their regalia says to Jews: 'You thought you escaped. You did not. We know where you are. When our strength is sufficient and when the time is ripe, we will come and get you.'"

On May 2, 1977, the Village of Skokie enacted three ordinances, namely:

Village Ordinance No. 77-5-N-994 entitled, "AN ORDINANCE RELATING TO PARADES AND PUBLIC ASSEMBLIES."

Village Ordinance No. 77-5-N-995 entitled, "AN ORDINANCE PROHIBITING THE DISSEMINATION OF MATERIALS WHICH PROMOTE AND INCITE GROUP HATRED."

Village Ordinance No. 77-5-N-996 entitled, "AN ORDINANCE PROHIBITING DEMONSTRATIONS

BY MEMBERS OF POLITICAL PARTIES WEARING MILITARY-STYLE UNIFORMS."

Ordinance #994 is a comprehensive permit system for all parades or public assemblies of more than 50 persons anywhere within Skokie. It requires all permit applicants to obtain $300,000 in liability insurance and $50,000 in property damage insurance. Ordinance #995 prohibits the dissemination of material which incites racial or religious hatred, with intent to incite such hatred. Ordinance #996 prohibits public demonstrations by members of political parties while wearing military-style uniforms.

On June 22, 1977, Collin applied for and was denied a permit under #994. The application recited that the proposed public assembly would take place on July 4, would consist of 30 to 50 people demonstrating in front of the Village Hall, would last about a half hour, and would not disrupt traffic. It stated further that the participants would wear uniforms including swastikas and carry placards carrying statements such as "White Free Speech", "Free Speech for the White Man", and "Free Speech for White Americans", but would not distribute handbills or literature.

The street where the Village Hall is located is commercially zoned. It is adjoined by residential areas to the north, south and west. The front of the Village Hall is clearly visible from dwelling units in the adjoining areas.

Evidence was presented at the trial with respect to the impact of acts prohibited by the ordinances upon Jews, generally, upon Jewish survivors of World War II and upon Polish Americans, Japanese Americans and Latin Americans.

ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF WRIT

POINT I

THE RULING OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT WAS CONTRARY TO A DECISION OF THE UNITED STATES SUPREME COURT WHICH HAS NEVER BEEN REVERSED.

In *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952), the United States Supreme Court sustained an Illinois statute containing the following language:

> "It shall be unlawful for any person, firm or corporattion to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots . . ."

The *Beauharnais* case has never been overruled or qualified by the Supreme Court of the United States.

In *United States* v. *Chase*, 281 F.2d 225 (1960), this Court said:

> "The Rogers case was a five to three decision. It has been frequently criticized. It is extremely doubtful that the holding in Rogers would be followed by the present Supreme Court. Nevertheless, if the Rogers decision is applicable to the situation before us, we must follow that decision, at least until such time as the Supreme Court may overrule it."

The United States Court of Appeals for the 4th and 6th Circuit have followed the same principle.

In *McCray* v. *Burrell,* 516 F.2d 357 (1975), the United States Court of Appeals for the 4th Circuit said:

> ". . . It is inappropriate to consider the policy considerations which might dictate a different course of decision. They must be addressed to the Supreme Court, which alone can overrule its prior decision . . . Our duty is clear: We must follow the Supreme Court, not attempt to lead it . . ."

Jordon v. *Gilligan,* 500 F.2d 701 (1974) involves a decision by the 6th Circuit Court. In that case the Court said:

> "Decisions of the United States Supreme Court rendered by written opinions are binding on all courts, state and federal. The Court's holding is stare decisis and cannot be overruled except by the Court itself. Even the Court's dicta is of persuasive precedential value . . ."

POINT II

THE DECISION OF THE COURT OF APPEALS CONTAINS CONCLUSIONS WHICH ARE AT VARIANCE WITH PRINCIPLES OF LAW ENUNCIATED BY THIS COURT IN OTHER CASES.

The cases at variance with the opinion of the Circuit Court of Appeals are *Watts* v. *U.S.,* 394 U.S. 705 (1969); *U.S.* v. *O'Brien,* 391 U.S. 367 (1948); and *Cox* v. *Louisiana,* 379 U.S. 559 (1965).

In *Watts,* at page 707, this Court said, "What is a threat must be distinguished from what is constitutionally protected speech." The existence of a threat is amply established by evidence in the record.

In *U.S.* v. *O'Brien,* at page 376 of Volume 391, the Court said, "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." The opinion of the Court of Appeals gave to the proposed demonstration the full protection of "speech" without distinguishing it from conduct.

To the same effect is *Cox,* which states as follows, "Picketing, though it may be utilized to communicate ideas, is not speech and therefore is not of itself protected by the 1st Amendment."

POINT III

THE ACTS OF THE VILLAGE AUTHORITIES IN PROHIBITING THE PROPOSED DEMONSTRATION WERE JUSTIFIED BY THE EXISTENCE OF A CLEAR AND PRESENT DANGER OF A SUBSTANTIVE EVIL.

There are two congruent circumstances in this case which take it outside of the scope of all authorities. The first is the historical reality of genocide within recent memory—the systematic, calculated extermination of six million Jews under the aegis of the swastika. The second is the special characteristics of Skokie's seventy thousand residents—approximately 40,500 of Jewish ancestry or religion, including thousands of the closest relatives of Holocaust victims and hundreds of survivors.

The evidence in the record challenges Defendant Collin's testimony that the purpose of his demonstration was to protest the Park District's denial of a permit. Collin accepted full responsibility for the preparation and distribution of a pamphlet to his followers which contained the following language:

> "We will march in Skokie because where there are the most Jews, there are the most Jew haters . . ."

Whatever his avowed purpose may have been, his proposed appearance with the swastika in front of the Village Hall in Skokie was intended by him to be observed there by the general public, those who happened to be passing by and those who would be attracted to his demonstration.

Given Skokie's unique population mix, and discounting the special concern of the Jewish population, sixty per cent of the general public to whom the defendant's "message" was intended to be delivered would be Jewish. Of this percentage, ten or fifteen percent would be Jews who were close relatives of deceased Holocaust victims, and many others would be Holocaust survivors.

The classic formulation of the "fire in a crowded theatre" doctrine was by Mr. Justice Holmes in *Schenck* v. *U.S.*, 249 U.S. 47 (1919) at page 52:

> We admit that in many places and in ordinary times the Defendants . . . would have been within their constitutional rights. *But the character of every act depends upon the circumstances in which it is done* . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theatre and causing panic. *It does not even protect a man from an injunction against uttering words that may have all the effect of force* . . . The question in every case is whether the words used are used in such circumstances as to create a clear and present danger that they will bring about the substantive evil that Congress has a right to prevent: *It is a question of proximity and degree.*" (Emphasis supplied)

There are many cases in which otherwise lawful expression of ideas was considered unlawful because of the circumstances in which the ideas would be expressed. In *Smith* v. *U.S.*, 502 F.2d 512 (1974), the judges of the Fifth Circuit affirmed the discharge of a staff psychologist for wearing a peace symbol in a veterans hospital:

> "We commence our analysis of the issues with a deep consciousness of the constitutional guaranty of free speech . . . In our consideration of the issue, *we must look to the place, time and circumstances disclosed by the record as well as the type of conduct involved* in striking the delicate balance necessary between the legitimate interests of the government and the constitutional rights of the appellant . . ." (502 F.2d, at page 514.) (Emphasis supplied)

Augustus v. *School Board of Escambia, Florida*, 507 F.2d 152 (1975) enunciated a similar opinion. The Court upheld an injunction against display of a Confederate flag in a high school and said (page 156):

> "An established exception to the First Amendment rights of students occurs . . . in cases where the exercise of that right causes violence and disruption in the educational process."

Carroll v. *Princess Anne*, 393 U.S. 175 (1968), involved a ten-day restraining order issued *ex parte* against a white supremacy group which was abusively anti-Black and anti-Jew. The thrust of the opinion involved the *ex parte* nature of the order. In *Carroll*, the Court said:

> "We do not here challenge the principle that there are special limited circumstances in which speech is so interlaced with burgeoning evils that it is not protected by the broad guaranty of the First Amendment."

In the course of the last twenty-five years, there have been two parallel developments in law which point to the validity of the ordinances. The first of these developments is the articulation by the Courts of the concept that mental suffering is in itself a basis for awarding relief in tort. Upon trial of this cause, the petitioners have established (1) that racial or ethnic taunts, epithets and slurs inflict psychic traumas upon individuals who are members of the defamed group and particularly upon such individuals who have been sensitized by exposure to discrimination and oppression; (2) that the Village of Skokie contains an unusual number of such individuals; and (3) that the public utterances of such defamatory materials creates an atmosphere of permissiveness among those in the population already predisposed to agree with the defamation and reenforces their latent hostilities.

In *Contreras* v. *Crown Zellerbach Corp.*, Wash., 565 P.2d 1173 (1977), the Supreme Court of Washington sustained a complaint based upon the "tort of outrage." In that case, the plaintiff claimed relief because of his exposure to scorn and ridicule solely by reason of his Mexican nationality. The language of the opinion is particularly relevant to the evil to which the Skokie ordinances are addressed:

> "As we as a nation of immigrants become more aware of the need for pride in our diverse backgrounds, racial epithets which were once part of common usage may not now be looked upon as "mere insulting language." Changing sensitivity in society alters the acceptability of former terms. It is noted in *Alcorn* v. *Anbro Engineering, Inc., supra* . . . 468 P. 219: "Although the slang epithet 'nigger' may once have been in common usage, along with such other racial characterizations as 'wop,' 'chink,' 'jap,' 'bohunk,' or 'shanty Irish,' the former expression has become particularly abusive and insulting in light of recent developments in the civil rights movement as it pertains to the American Negro. Nor can we accept defendants' contention that plaintiff, as a truckdriver must have become accustomed to such abusive language. Plaintiff's own susceptibility to racial slurs and other discriminatory conduct is a question for the trier of fact, and cannot be determined on demurrer." The same conclusion is compelled with regard to Mexican-Americans and the various slang epithets that may have once been in common usage regarding them. It is for the trier of fact to determine, taking into account changing social conditions and plaintiff's own susceptibility, whether the particular conduct was sufficient to constitute extreme outrage."

In Illinois the courts have recognized that the intentional infliction of mental suffering is compensable in a suit for damages. The history and development of this concept is outlined in *Public Finance Corp.* v. *Davis*, 66 Ill.2d 85 (1976), and in *Knierim* v. *Izzo*, 22 Ill.2d 73 (1961). The attention of this court is called to the following quotation from *Knierim*:

> "We conclude that peace of mind is an interest of sufficient importance to receive protection from the law against intentional invasion of the kind here involved."

The following quotation from *Chicago Real Estate Board* v. *City of Chicago*, 224 N.E.2d 793 (1967), is appropriate:

> "Where speech is an integral part of unlawful conduct, it has no constitutional protection. (*Giboney* v. *Empire Storage and Ice Co.*, 336 U.S. 490, 498, 69 S.Ct. 684, 93 L.Ed. 834.) More particularly, restrictions on speech against racial and religious groups have been sustained by the United States Supreme

> Court. (*Beauharnais* v. *People of the State of Illinois*, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919.) In the Beauharnais case the court held that an Illinois law curbing racial and religious propaganda that tended to incite breaches of the peace did not infringe freedom-of-speech guarantees. The court reasoned that in the face of the history of racial violence and accompanying extreme racial and religious propaganda, the Illinois legislature was not without reason in seeking to curb such defamatory propaganda, and that under the circumstances it was not necessary to consider the "clear and present danger" concept."

Along with the development of the concept of compensation for mental suffering or invasion of peace of mind, there has been a progression of legal and social events with respect to the extension of constitutional guarantees to persons deprived of them by reason of their racial or ethnic origin.

The extension of freedom of opportunity to persons, irrespective of race or ethnic origin has been held to be of sufficient importance to warrant unprecedented curbing of the right of free speech. Real estate brokers are prohibited from distributing leaflets which, while they do not defame persons by reason of their background, nevertheless serve to implant or inflame fears that the sale of property to Blacks will diminish property values, as will be noted from the following excerpts from the opinion of the Illinois Supreme Court in the *Chicago Real Estate Board* case, *supra*:

> "The controversial provision of the Fair Housing Ordinance, attacked as a violation of freedom of speech guarantees, was designed to strike at the practice of "panic peddling," which is condemned by all parties to this litigation. That device, whereby owners are induced to part with their property by implanting

> or inflaming fears that property values will diminish because Negroes are, or may become, residents, not only defames a group, but is a technique used by some real-estate brokers to perpetuate segregated housing. *As such, it is a handmaiden of the other discriminatory practices declared unlawful in this ordinance, and it is not entitled to constitutional protection.*" (Emphasis added)

The Village of Skokie has a Fair Housing Ordinance similar to the one tested in *Chicago Real Estate Board, supra*. It has a well established policy of preserving the right of all citizens, irrespective of their ancestry, color or creed, to share in all of the benefits of citizenship on a de facto as well as de jure basis. The Village strongly asserts that the public dissemination of racially defamatory and hatred inciting materials is inimical to this policy and is "the handmaiden of other discriminatory practices."

There is no constitutional right to perform an act which inflicts injuries upon another and the Village has the right to intervene if it considers such injuries to be of sufficient consequence. Acting under the Constitution of Illinois as a Home Rule unit and a uniquely sovereign body, the Village Trustees have the right to determine whether or not this evil exists and to take appropriate steps to protect the Village and its citizens from it.

The substantive evil of the conduct prohibited by the ordinances is clearly recognized in *Beauharnais* v. *Illinois, supra.*

> "Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjust-

ments required for free, ordered life in a metropolitan, polyglot community. From the murder of the abolitionist Lovejoy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction. In many of these outbreaks, utterances of the character here in question, so the Illinois legislature could conclude, played a significant part."

In *Gregory* v. *Chicago,* 394 U.S. 111 (1969), the Court reversed a disorderly conduct conviction against Dick Gregory, whose demonstration became disorderly only because of the audience reaction to it. An interesting aspect of the case is the special opinion by Mr. Justice Black, a staunch supporter of First Amendment rights:

> "In agreeing to the reversal of these convictions, however, I wish once more to say that I think our federal Constitution does not render the states powerless to regulate the conduct of demonstrators and picketers, conduct which is more than 'speech', more than 'press', more than 'assembly', and more than 'petition'."

Petitioners respectfully submit that the proposed demonstration of the defendants in Skokie with swastika is "more than speech", "more than petition", just as Genocide is more than murder. The assault upon Jews by evoking the bitter memory of mother, father, children, brothers and sisters slaughtered under the swastika is unprecedented.

POINT IV

THE ORDINANCES ARE NOT UNCONSTITUTIONALLY OVERBROAD OR VAGUE.

The proscribed conduct is set forth in two ordinances which were enacted on the same date. The first is ordinance No. 994, which refers to acts which ". . . portray criminality, depravity or lack of virtue in . . . a person or group of persons by reason of reference to racial, religious, ethnic affiliation." Immediately following the enactment of ordinance No. 994, the Village Board enacted ordinance No. 995 which prohibits the dissemination of materials within the Village of Skokie which ". . . promotes and incites hatred of persons by reason of their race . . ."

It is a rule of statutory interpretation that legislative enactments dealing with the same subject matter and enacted at the same time are to be construed together in determining legislative intent.

The ordinances, construed together, fully meet the standard set forth in *People* v. *C. Betts Realtors, Inc.,* 361 N.E. 2d 585 (1977), as follows:

> "A statute is fatally vague only when it exposes a potential actor to some risk or detriment without giving him fair warning of the nature of the proscribed conduct."

The "actor" who would parade or publicly demonstrate in the Village of Skokie has no problem in determining from the ordinances what he can or cannot do. There is no esoteric or mysterious concept involved in the portrayal of depravity or criminality in persons of a given ethnic or racial origin.

The ordinance which prohibits dissemination of materials inciting group hatred requires a specific intention to do so and specifically relates to the distribution of posters, signs, handbills and public display of markings and clothing of symbolic significance.

As stated by Mr. Justice Frankfurter in *Beauharnais* (supra):

> "It is a law specifically directed at a defined evil, its language drawing from history and practice in Illinois and in more than a score of other jurisdictions a meaning confirmed by the Supreme Court of that State in upholding this conviction. We do not, therefore, parse the statute as grammarians or treat it as an abstract exercise in lexicography. We read it in the animating context of well-defined usage, *Nash* v. *United States*, 229 U.S. 373, and State court construction which determines its meaning for us. *Cox* v. *New Hampshire*, 312 U.S. 569; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568."

Certainly the ordinances meet the standard set forth by Mr. Justice Stevens in *Young* v. *American Mini Theatres*, 427 U.S. 50 (1977) (at page 61) in that they are "readily subject to a narrowing construction by the state courts."

POINT V

THE CONCEPT OF FREEDOM OF SPEECH IN THE MARKETPLACE OF IDEAS HAS NO APPLICATION TO THE CONDUCT PROHIBITED BY THE SKOKIE ORDINANCES.

The 7th Circuit Court of Appeals affirmed the right of plaintiffs to publicly espouse their ideas and opinions within the Village of Skokie, presumably even those pertaining to Genocide. This position does not meet the question of intentionally false and defamatory statements.

The portrayal of criminality or depravity in a person or group of persons by reason of their parentage is a falsehood. Persons are simply not criminal or depraved by the circumstances of their birth, and to say or imply otherwise is to utter a lie. When, in addition, such statements are intentionally designed to incite hatred against persons by reason of their parentage, then they do not warrant constitutional protection.

In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court said:

> "We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. *New York Times* v. *Sullivan*, 376 U.S., at 270. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942)."

It is certainly true that everyone has a right to his opinion, even those opinions that are the most repulsive, and one may add to it the right to express such opinions openly and publicly and be protected by the First Amendment. However, deliberately false statements are not protected. Everyone has the right to sell a product, but false statements concerning its efficacy are prohibited. Candidates have the right to express their views publicly on all issues, but unfair campaign practices consisting of false statements are prohibited.

That type of lie which attributes evil to a person by reason of its parentage is particularly devastating. The racial taunt is not an idea but a blow. Its harm occurs when the blow is struck. It is unanswerable. It expresses no idea other than that of death, destruction, hatred,

viciousness, discrimination or abuse. It is totally lacking in social content.

The Village is not attempting to censor books or to inhibit the dissemination of ideas, even those which it finds hateful. Rather, it is attempting to prevent the direct racial or ethnic lie, the type of outrageous conduct whch inflicts harm immediately upon utterance and is socially destructive for that reason.

The trial court and the Court of Appeals discussed *Terminiello* v. *Chicago,* 337 U.S. 1 (1949); *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969); *Tinker* v. *Des Moines Independent School District,* 393 U.S. 503 (1969); and *Cohen* v. *California,* 403 U.S. 15 (1971).

The *Brandenburg* case is indeed very significant in the development of constitutiional law in the United States. Its effect was to invalidate a wide array of criminal syndicalist laws under which members of organizations were punished because of their advocacy of unlawful actions. By reversing *Whitney* v. *California,* 274 U.S. 357 (1927); the *Brandenburg* opinion very effectively put the quietus upon laws which punished persons for mere advocacy. The *Terminiello* case applied to another wide selection of ordinances and statutes which made a speaker's conduct unlawful if it "stirs the public to anger, invites dispute, brings about unrest, or creates a disturbance."

The Skokie ordinances fall in neither of these two categories.

The conduct prohibited by the Skokie ordinances is by its nature inherently productive of violence and disorder. This, together with its emotional assault and libelous, defamatory content and intentional provocation and incite-

ment to riot is a part of the substantive evil which the Village had a right to prohibit.

Cohen and *Tinker* involve expressions of opposition to the Viet Nam war. In *Cohen* the opposition was expressed by the sign: "Fuck the draft" and in *Tinker* it was expressed by a black arm band. The U.S. Supreme Court found both expressions of opinion to be permissible. The four letter word which might be offensive to some was not directed to any particular individual or group of individuals. The arm band, as a political protest, was an expression of an idea which abused no one by reason of his race, religion or ethnic background. Neither of these cases have anything to do with the subject matter or the ordinances in Skokie.

Constitutional protection has never been given to fighting words or words which by their very utterance inflict harm or provoke an immediate hostile reaction. *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942). The language of the Skokie ordinance is, if not directly within the concept of "fighting words", at least sufficiently similar in concept to warrant the same immunity from constitutional attack.

The defendants share the trial court's concern that the prohibition of evil ideas may create a precedent that could stifle the democratic process. The unasked question is where to draw the line and the corrollary is whether it should ever be drawn at all. Such a concern might be warranted if the position of the Village of Skokie was based solely upon the unpopularity of the plaintiff's conduct and the abhorrence of its citizens to it. However, the false and defamatory implication of evil to persons by reason of their parentage is specific and the emotional

suffering which such conduct would inflict is peculiar to Skokie's residents.

The Skokie ordinances, in effect, would ban the intentional incitation of hatred against a person by falsely portraying the group to which he belongs because of his parentage, as depraved or evil. It is an affront to the judicial system to suggest that the affirmation of this principle could serve as a precedent for the suppression of other unpopular or repugnant ideas.

In *Beauharnais* v. *Illinois,* (supra), the Court said, at page 263:

> "We are warned that the choice open to the Illinois legislature here may be abused, that the law may be discriminatorily enforced; prohibiting libel of a creed or of a racial group, we are told, is but a step from prohibiting libel of a political party. Every power may be abused, but the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law. 'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel. Of course discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled."

Petitioners accept the time hallowed concept that all ideas should compete in the marketplace to the end that the good will eventually prevail over the bad. Accepting this philosophy does not mean that the marketplace itself should be unregulated for the public good. In the commercial field, intelligent and reasonable regulation, far from preventing competition, can serve to stimulate and promote it. In the marketplace of ideas, regulation can have a similar result.

Falsehoods intentionally designed to incite racial, national and religious hatreds do not promote competition of ideas in the marketplace, but, on the other hand, obscure and degrade them. The portrayal of criminality or depravity by reason of race, religion or origin carries the implication of evil in members of a group solely because of their parentage. This is a monstrous, blatant, unmitigated lie. It deserves no more protection in the marketplace of ideas than would a nationwide TV broadcast advertising a false miracle cancer drug.

POINT VI

THE PROPOSED DEMONSTRATION IS AN INTENTIONAL INCITEMENT TO RIOT AND A DELIBERATE PROVOCATION WHICH DOES NOT WARRANT FIRST AMENDMENT PROTECTION.

The opinion of the Circuit Court of Appeals cited *Brandenburg* v. *Ohio,* 395 U.S. 447 (1969) and *Feiner* v. *New York,* 340 U.S. 315 (1951) as authority that intentional incitement to riot may be prohibited. In *Brandenburg,* the Court said (at page 447) ". . . The constitutional guarantees of free speech and free press do not permit the state to forbid or proscribe advocacy of use of force or of law violation *except where such advocacy is directed to inciting or provoking imminent lawless action and is likely to incite or produce such action*" (emphasis added). In *Feiner,* the Court said, "No one would have the hardihood to suggest that the principle of freedom of speech sanctioned incitement to riot . . ." However, the opinion below precluded the consideration of these cases because of "concessions" made by the Village of Skokie.

Constitutional issues, particularly involving a municipality as a litigant, should be determined by the facts as

established by the record and the law applicable to them and not by alleged "concessions" or failure to argue by or on behalf of the municipality. *Mitchell* v. *Archibald and Kendall, Inc.*, No. 77-2216, 7th Circuit Court of Appeals.

The Village of Skokie has a constitutional obligation to preserve order and to restrain violence in the event that the proposed demonstration is sanctioned by the Courts and takes place in the Village. It does not "fear" this eventuality because it is confident that its resources will be sufficient to control the situation. Statements to this effect made in argument should not be construed as concessions with respect to the legality of the proscribed conduct. The Court of Appeals likewise denied the applicability of the "fighting words" doctrine in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1948) for the same reason. It seems absurd to hold that fighting words addressed to an individual can be proscribed (as in *Chaplinsky*) while fighting words addressed to an entire group under much more serious conditions cannot be.

The Village does not argue that *Terminiello* v. *Chicago*, 337 U.S. 1 (1949) which refers only to conduct which "stirs the public to anger, invites dispute, brings about unrest, or creates a disturbance" should be overruled. The conduct proscribed by the ordinance and the proposed demonstration would *also* constitute group defamation and inflicting emotional distress of the most serious kind, and deliberately and intentionally provoking and inciting to riot.

CONCLUSION

In a footnote to the opinion in *Beauharnais, supra*, Mr. Justice Frankfurter said (343 U.S. at page 263):

> "The rubric 'race, color, creed or religion' which describes the type of group libel which is punishable, has attained too fixed a meaning to permit political groups to be brought within it. If a statute sought to outlaw libels of political parties, quite different problems not now before us would be raised. For one thing, the whole doctrine of fair comment as indispensable to the democratic political process would come into play."

Mr. Justice Jackson, specially dissenting in *Kunz* v. *New York*, 340 U.S. 290, said at page 299:

> "Jews, many of whose families perished in extermination furnaces of Dachau and Auschwitz, are more than tolerant if they pass off lightly the suggestion that unbelievers in Christ should all have been burned."

In 340 U.S. at page 313, Mr. Justice Jackson said:

> "If any two subjects are intrinsically incendiary and divisive, they are race and religion. Racial fears and hatreds have been at the root of the most terrible riots that have disgraced American civilization. They are ugly possibilities that overhang every great American city. The 'consecrated hatreds of sect' account for more than a few of the world's bloody disorders. These are the explosives which the Court says Kunz may play with in the public streets, and the community must not only tolerate but aid him. I find no such doctrine in the Constitution."

The plaintiff Collin would play with the same explosives in the streets of Skokie, Illinois.

REQUEST FOR RELIEF

It is respectfully requested that this Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit and that upon such review this Court reverse that decision.

Respectfully submitted,

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